REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE, GRAHAMSTOWN)

In the matter between: Case No: CA 159/2012

NOKUZOLA NTONGA First Appellant

LIONEL RICHARD BALL Second Appellant

And

THE STATE Respondent

Coram: **Nepgen, Chetty and Griffiths JJ**

Date Heard: **30 July 2013**

Date Delivered: **22 August 2013**

Summary: ***Criminal Law*** *– Rape and Sexual Exploitation of a child – Evidence – Adequacy of proof – Cautionary Rules – Corroboration – False evidence by accused – Appeal dismissed*

JUDGMENT

Chetty, J

[1] The appellants, *Nokuzola Ntonga* and *Lionel Richard Ball*, a thirty six year old female and forty five year old male respectively, were arraigned for trial

before Roberson J on multiple charges (counts 1-7) under the **Criminal Law (Sexual Offences and Related Matters) Amendment Act**[1] (the Act). I shall, in the course of this judgment, in conformity with the appellations adopted by the trial court, refer to the appellants as accused no.'s 1 and 2 respectively, and to the witnesses, correspondingly. Counts 2, 4, 6 and 7 were preferred against accused no. 1 whilst counts 1, 3 and 5 against accused no. 2.

The case against accused no. 1

[2] On counts 2 and 6, the State alleged that in contravention of s 17(2) of the Act, the accused unlawfully and intentionally offered the services of child complainants, *NM*, a fifteen year old girl, and *V*, an 11 year old girl to accused no. 2 with or without their consent for financial or other reward, favour or compensation to her

i) for purposes of the commission of a sexual act with the said child complainants by Accused No. 2, by arranging a meeting between them; and/or

ii) by participating in, being involved in, promoting, encouraging or facilitating the commission of a sexual act with the said child complainants by Accused No. 2, by arranging a meeting between them; and/or

[1] Act No, 32 of 2007

iii) by making available, offering or engaging the said child complainants for purposes of the commission of a sexual act with the said child complainants by Accused No. 2, by arranging a meeting between them.

[3] On count 4 she was charged with a contravention of s 55 and related provisions of the Act. The State alleged that on 15 June 2009, accused no. 1 unlawfully and intentionally conspired with, and/or abetted accused no. 2 to commit a sexual offence by arranging a meeting or communication between accused no. 2 and *V*, thereby facilitating and/or enabling the said accused no. 2 to commit a sexual offence with *V*. Section 55 reads as follows: -

> "**55 Attempt, conspiracy, incitement or inducing another person to commit sexual offence**
>
> Any person who-
>
> *(a)* attempts;
>
> *(b)* conspires with any other person; or
>
> *(c)* aids, abets, induces, incites, instigates, instructs, commands, counsels or procures another person,
>
> to commit a sexual offence in terms of this Act, is guilty of an offence and may be liable on conviction to the punishment to which a person convicted of actually committing that offence would be liable."

[4] On count 7, the trafficking charge in contravention of s 71(1) of the Act, the State alleged that on 15 June 2009, the accused unlawfully and intentionally trafficked *V*, by supplying and/or removing and/or transporting the said complainant by means of deception or false pretences to accused no. 2, for the purpose of any form or manner of sexual offence or abuse of a sexual nature, without her consent. Section 71(1) reads as follows: -

> **"71 Trafficking in persons for sexual purposes**
> (1) A person ('A') who trafficks any person ('B'), without the consent of B, is guilty of the offence of trafficking in persons for sexual purposes."

The charges against Accused No. 2

[5] On counts 1 and 5, accused no. 2 was charged with sexual exploitation of the aforementioned child complainants in contravention of s 17(1) of the Act. The section reads as follows: -

> "**17 Sexual exploitation of children**
> (1) A person ('A') who unlawfully and intentionally engages the services of a child complainant ('B'), with or without the consent of B, for financial or other reward, favour or compensation to B or to a third person ('C')-
> *(a)* for the purpose of engaging in a sexual act with B, irrespective of whether the sexual act is committed or not; or
> *(b)* by committing a sexual act with B,

> is, in addition to any other offence which he or she may be convicted of, guilty of the offence of sexual exploitation of a child."

On count 3, he was charged with raping *V* in contravention of s 3 of the Act.

[6] The accused pleaded not guilty to each of the charges preferred against them. Accused no. 1 elected not to disclose the basis of her defence whilst accused no. 2 denied having committed any act of sexual exploitation or having raped the complainant. The State adduced the evidence of *NM*, Ms *Andiswa Tamara Ngxekese* (*Andiswa*), *V* and Dr *Reema Matthew* (Dr *Matthew*) and, at the close of its case, the accused applied for their discharge on all the counts. In acquitting accused no. 1 on count 2, the trial court found that absent any evidence by *NM* that she i.e. accused no. 1 had been offered any financial or other reward, favour or compensation by accused no. 2 for the purposes envisaged by subsections (1) to (d), the application ought to be granted. In similar vein, accused no. 2 was discharged on count 1. In respect of the remaining counts, the applications were refused and in due course both accused testified, as well as a Mr *Raath* (*Raath*), a defence witness for accused no. 2.

[7] In its judgment, the trial court found that notwithstanding *V's* age and that she was a single witness on count 3, she was an honest and reliable witness. In her assessment and evaluation of the testimony adduced, the trial judge rejected

the accuseds' version as false, accepted *V's* evidence and that of *Andiswa*, duly convicted the accused on the remaining counts and sentenced each to varying periods of imprisonment. This appeal is before us, leave having been granted by the trial judge in respect of only the convictions of accused no. 1 and both the convictions and sentences imposed on accused no. 2.

[8] Deriving inspiration from Marcellus' forewarning to Hamlet that ***"something is rotten in the state of Denmark,"*** accused no. 2's counsel, Mr *Raubenheimer's* opening gambit in the appeal was that a rereading of the transcript exacerbated his initial sense of foreboding that the prosecution of the accused had been fraudulently concocted and that they had been falsely implicated in the commission of the offences charged by *V*. Mrs *Crouse*, who appeared on behalf of accused no. 1, echoed Mr *Raubenheimer's* presentiment. In developing his argument that the prosecution of the accused appeared highly suspect, he pointed to a number of factors which fuelled his suspicion *viz*, the material conflict between *Raath* and V*'s* testimony, the unexplained presence of V before the police forum whence she reported the rape, the failure by the State to tender the evidence of crucial witnesses, the inconclusiveness of the medical evidence and what he termed, the ***"time problem"***.

[9] Counsel furthermore submitted that had the trial court properly applied the cautionary rules articulated by Jones J in ***S v Dyira***[2] and ***S v MG***[3], it could not

[2] 2010 (1) SACR 78 (ECG)
[3] 2010 (2) SACR 66 (ECG)

have concluded that *V* was a satisfactory and reliable witness on whose evidence it could safely rely upon to find that the guilt of the accused had been established beyond a reasonable doubt. In ***MG***, Jones J, with reference to earlier authority, including ***Dyira***, articulated the proper approach to the evidence of a child witness, who was moreover a single witness as, follows:

> "[7] The first issue is the reliability of the evidence of the State, which brings me to the defence argument that the evidence is insufficient because of the magistrate's inadequate application of the cautionary rule of evidence. The cautionary rule came into being because of s 208 of the Criminal Procedure Act 51 of 1977 which provides that an accused person may be convicted on the single evidence of a competent witness (which includes a child witness). This is, of course, provided that the single evidence is good enough to discharge the onus of proof of guilt beyond reasonable doubt. In an unreported decision in this court (*Dyira* H *v S*, Eastern Cape Division, Grahamstown, case No 222/07, 2 June 2009, paras 6 and 10)* I had occasion to comment that:
>
> '(T)o assist the courts in determining whether the onus is discharged, they have developed a rule of practice that requires the evidence of a single witness to be approached with special caution (*R v Mokoena* I 1956 (3) SA 81 (A) at 85, 86). This means that the courts must be alive to the danger of relying on the evidence of only one witness, because it cannot be checked against other evidence. Similarly, the courts have developed a cautionary rule which is to be applied to the evidence of small children (*R v Manda* 1951 (3) SA 158 (A) at 162E - 163E). The courts should be aware of the danger of accepting the evidence of a little child because of potential unreliability or untrustworthiness, as a result of lack of judgment, immaturity, inexperience, imaginativeness, susceptibility to influence and suggestion, and the beguiling capacity of a child to convince itself of the truth of a statement which may not be true or entirely true, particularly where the allegation is of sexual misconduct, which is normally beyond the experience of small children who cannot be expected to have an understanding of the physical, social and moral implications of sexual activity (*S v Viveiros* [2000] 2 All SA 86 (SCA) para 2). Here, more than one

cautionary rule applies to the complainant as a witness. She is both a single witness and a child witness. In such a case the court must have proper regard to the danger of an uncritical acceptance of the evidence of both a single witness and a child witness (Schmidt *Law of Evidence* 4-7).

. . .

Our courts have laid down certain general guidelines which are of assistance when warning themselves of the danger of relying upon a single witness who is also a child witness. In the ordinary course:

(a) a court will articulate the warning in the judgment, and also the reasons for the need for caution in general, and with reference to the particular circumstances of the case;

(b) a court will examine the evidence in order to satisfy itself that the evidence given by the witness is clear and substantially satisfactory in all material respects . . . .;

(c) although corroboration is not a prerequisite for a conviction, a court will sometimes, in appropriate circumstances, seek corroboration which implicates the accused before it will convict beyond reasonable doubt.. . . ;

(d) failing corroboration, a court will look for some feature in the evidence which gives the implication by a single child witness enough of a hallmark of trustworthiness to reduce substantially the risk of a wrong reliance upon her evidence (*S v Artman* 1968 (3) SA 339 (A) at 340H).'

[8] The cautionary rule is a rule of practice, not a rule of law, to be applied in the light of the warning of Holmes JA in the *Artman* judgment cited above at 341C, that -

'. . . while there is always need for caution in such cases, the ultimate requirement is proof beyond reasonable doubt; and courts must guard against their reasoning tending to become stifled by formalism. In other words, the exercise of caution must not be allowed to displace the exercise of common sense; . . '.

There are cases where the evidence of a single child witness has been found to be clear and satisfactory in every material respect, and hence sufficient for proof beyond reasonable doubt, without corroboration implicating the accused or without some additional hallmark of trustworthiness, other than the inherent value of the child's evidence itself (*Director of Public Prosecutions v S* 2000 (2) SA 711 (T)). What is always necessary is that the evidence of a single child witness is evaluated with a full appreciation of the dangers of an uncritical reliance upon it."

[10] I have reproduced this rather prolix extract from ***MG***, for the validity of the arguments advanced before us must be examined within the parameters enunciated therein, as against the trial court's judgment, and in particular, its assessment of *V's* testimony. The trial judge commenced her examination of V's testimony recognizing that she was now a 13 year old grade 5 learner and proceeded to fully record her version of the events as they unfolded. At the outset, she noted that *V* had under cross-examination admitted having lied in her police statement. She analysed the medical evidence in detail and set out the versions of both accused and *Raath*. In her initial assessment of the accuseds' testimony she found that:-

> "Accused no. 1 was not an impressive witness. She contradicted herself in many respects and often adapted her version when confronted with certain facts under cross-examination.
>
> Accused no. 2 generally maintained his version under cross-examination, but at times his evidence was vague and generalized, for example in relation to whether or not he had seen V with the other children standing at the particular spot. He also on a number of times did not answer a question directly, when the question was capable of such an answer, and the question had to be repeated sometimes more than once before he answered it. He too adapted his evidence to a certain extent, for example when asked why he had not given V money, and whether or not he had a conversation with V.
>
> Raath was a satisfactory and consistent witness. It was not in dispute that he was at accused no. 2's house that Saturday morning and he did not appear to give an account of events which was slanted in favour of accused no. 2."

[11] In her preface to the evaluation of *V's* testimony, the learned judge acknowledged the need to approach her evidence with caution given her admission that she had been untruthful in certain respects in her police statement and that some pressure appeared to have been exerted on her to report the matter to the police forum. It is apparent from the structure of the judgment and the holistic appraisal of the testimony adduced however, that notwithstanding the obvious deficiencies in *V's* testimony, she was satisfied that she was an honest and reliable witness. As adumbrated hereinbefore, the apparent irreconcilable conflict between her testimony and that of *Raath* is one of the cornerstones upon which the appeal is predicated. In argument before us Mr *Raubenheimer* submitted that the trial court's finding that *V* was a credible and reliable witness was incompatible with its earlier conclusion that ***"Raath was a satisfactory and consistent witness"***. Counsel argued that *Raath's* testimony *per se* proved the falsity of *V's* testimony concerning the events in accused no. 2's home and warranted the rejection of her entire body of evidence.

[12] *Raath's* presence in the house first surfaced during *V's* evidence in chief. In answer to the question whether she and accused no. 2 left his home immediately after the shower, she replied as follows: -

> "No M'lady another white man arrived there he remained there for a long time and I was kept inside the bedroom. I was kept locked inside the bedroom.
> Did this other white man who arrived there see you? --- No.
> Did you see him? --- Yes M'Lady he told me to remain in the bedroom because he had to go and attend to someone in the kitchen.
> Did you see this other person now that he was going to attend to? --- No.
> How did you know that it was a white man? --- I deduced that from the way the person spoke.
> Could you hear them whilst they were conversing from the bedroom where you were? --- Yes.
> Was it your first time in this house to be in this house of this white man? --- Yes it was the first time.
> On your arrival at this house were there any other people inside this house? --- No.
> Which language was this white man now, who brought you to this house, talking to you? --- He was speaking in isiXhosa.
> Can you tell us now V what, until when did you remain in this bedroom? --- Until the white man left. Until that white man left.
> When you say that white man left, which one are you referring to? --- The one who had gone to that house."

[13] Under cross-examination by the second accused's erstwhile counsel, it was put to *V* that he would deny having locked the bedroom door and that she was made to sit on a chair and watch television whilst the accused was attending to his business and had been seen by *Raath* when he visited the accused during the course of the morning. *V* of course denied what had been put to her and maintained that she had not seen *Raath*. The submission that the conflict between her evidence and that of *Raath* on this issue is sufficient, in itself, to

warrant the rejection of her testimony is untenable. By *Raath's* own admission, he was at accused no. 2's home for almost 3 hours and saw her fleetingly en route to the bathroom shortly before he left. Under cross-examination by Mr *Coetzee* he conceded that although he stated in chief that *V* was a girl child, the description was an *ex post facto* deduction – in truth, all he remembered, was seeing a black child on a chair in front of the television. *V's* evidence under cross-examination that ***"he locked the doors"*** cannot be viewed in isolation. The second accused admitted that when they entered his home, through the back door, he locked the security door but not the door itself. *V's* double barrelled answer in chief that, ***"I was kept inside the bedroom. I was kept locked inside the bedroom"***, does not warrant the conclusion that her evidence is false. On the accepted evidence she was in the house for a considerable period of time and the probabilities are that when *Raath* arrived, *V* was made to wait in front of the television. Her failure to recall having watched television or that the door was ajar does not warrant the inference that she was untruthful. There was nothing to gain by manufacturing this tittle of evidence. She had in chief readily admitted *Raath's* presence in the house.

[14] *V's* imperfect recollection concerning the door or watching television cannot, on a holistic appraisal of her testimony, lend itself to the conclusion, as suggested, that *Raath's* testimony establishes the falsity of her evidence. *V's* confusion can no doubt be attributed to the trauma attendant upon the rape immediately prior to *Raath's* appearance in the house. It is inconceivable that

accused no. 2 would not have closed the bedroom door when he led *V* thereto given the presence of employees in the workshop who, by his own admission, would occasionally come to the kitchen. The closing of the door, given her age and the trauma she had been subjected to, no doubt became fixated in her mind to the extent that she could have forgotten that when accused no 2 exited the bedroom, the door remained ajar. The conflict between her evidence and that of *Raath* on this issue, does not deleteriously impact on her credibility and reliability.

[15] Mr *Raubenheimer* further submitted that the unexplained appearance of *V* before the police forum where the rape was reported was highly suspicious and could have provided the catalyst for *V* to have falsely implicated the second accused. The submission ignores crucial evidence. The circumstances surrounding *V's* presence before the police forum can however hardly be called suspicious. It is common cause that during that morning accused no. 1 had sent *Andiswa* to *V's* home to fetch her. It is furthermore not in dispute that *V* resided with her elder sister, *Fezeka*, and that was the home to which *Andiswa* went. Accused no. 1 testified that *Andiswa* had reported to her that *V* was not at home but at *Analisa's* home in Santa and that is where they proceeded to with accused no. 2 and where *V* was fetched. It must be remembered that *V's* evidence that accused no. 1 had said that she was being taken to a social worker was refuted by accused no. 1.

[16] The falsity of accused no. 1's denial that she had mentioned social workers to the occupants of the house when she fetched *V* from *Analisa's* home was clearly established during her cross-examination by Mr *Coetzee*. It is common cause that after her arrest, accused no. 1 made a statement to magistrate Joemath at the East London Magistrates' Court. The statement was handed in as exhibit "B1" by consent and its content adverted to by Mr *Coetzee* during his cross-examination of accused no. 1. Therein, accused no. 1 recounted a heated exchange between herself and *Fezeka* during the afternoon of 15 June when the latter informed her that the occupants of *Analisa's* home had informed her that she had fetched *V* to take her to the social workers and that *Fezeka* had then admonished her.

[17] In her evidence in chief *V* denied having divulged what had befallen her during her absence from *Analisa's* home. She recounted that *Fezeka* and her husband had fetched her from *Analisa's* home the following morning. Under cross-examination by Mr *Price*, she was referred to an admission in her police statement that she had reported the rape to *Analisa* and when the conflict was put to her, she admitted that she had not reported the rape to *Analisa*. The proposition was then put to her that the failure to report the alleged rape demonstrated, quite unequivocally, that she had not been raped. The submission that V's presence before the police forum, raises suspicion, however, proceeds from an acceptance of her testimony that she in fact said nothing to anyone. It conveniently ignores accused no. 1's evidence of the altercation between her

and *Fezeka* during the afternoon of 15 June 2009. *V's* silence, the admitted acrimonious exchange between accused no. 1 and *Fezeka*, coupled with the revelation that she had been fetched in order to take her to a social worker, provides the clearest answer for her presence before the police forum – it raised deep suspicion.

[18] On the probabilities, *V's* silence vouchsafes her evidence that she had been raped. It is inconceivable that she would have been reticent to reveal something as innocuous as accused no. 2's offer to purchase shoes for her and then repay her benefactor by falsely accusing him of raping her. On the contrary, her reluctance to speak is, given her age, understandable, given the ordeal she had been subjected to.

[19] *V's* testimony that accused no. 2 immediately stopped raping her when she cried out was furthermore assailed as being highly improbable. It was submitted that if the second accused's avowed purpose was to have sexual intercourse with *V*, then it was passing strange that he would have stopped when she cried out. I do not share counsel's consternation that his act of desistance establishes the improbability of *V's* evidence. There is to my mind a plausible explanation for this apparent anomaly, provided, inadvertently, by accused no. 2 himself.

[20] Accused no. 1's evidence that accused no. 2 had seen *V* on a previous occasion was never placed in issue. When her unchallenged testimony was put to him under cross-examination by Mr *Coetzee*, he evaded the question and waxed lyrically about having seen groups of prostitutes standing along the side of the road and their machinations to attract the attention of prospective clientele. By his own admission there were young girls among these prostitutes and the inference can properly be drawn that by association, he regarded them as prostitutes as well, hence the instruction to accused no. 1 to procure *V* on the morning in question. Unbeknown to him however *V* was not a prostitute but in fact a virgin. I interpolate to say that the contention that she was not, amounts to pure conjecture. By her own admission the sexual encounter was extremely painful and when she cried out, accused no. 2 must have realised not only her chasteness but that to continue could, given her tender age, injure her genitally. Consequently, there is nothing improbable in *V's* version. The medical evidence fully corroborates her evidence that she had been raped. The argument advanced that the vaginal trauma could have been self inflicted, was speculative, never put to *V* and, a spurious one.

[21] The trial court's finding that accused no. 2 had raped *V* was arrived at upon a conspectus of the entire body of evidence, including the accuseds'. As pertinently pointed out by Jones J in ***Dyira***, ***"Sometimes the court is able to find satisfaction of a cautionary rule by the poor quality of the evidence of an accused person"***. After a holistic appraisal of the evidence adduced, the trial court concluded that the evidence of both accused was ***"contrived,***

contradictory and patently false . . .” The correctness of that finding was attacked during argument, but the transcript itself validates the trial court’s judgment.

[22] The incongruity between the accuseds’ versions concerning *V’s* presence, initially in accused no. 2’s vehicle, and ultimately, in his bedroom, is inexplicable. Accused no. 1’s unchallenged evidence was that she, accompanied by *Andiswa*, had sought out *V* on the specific instructions of accused no. 2 in order for him to purchase a pair of shoes for her. *Andiswa’s* unchallenged evidence was that when they could not find *V* at home, she and accused no. 1 walked to accused no. 2’s vehicle and informed him ***“she is not available, he or she is at Santa”***. They then proceeded to Santa to fetch *V* at *Analisa’s* home whereafter they drove off.

[23] Accused no. 2 steadfastly maintained that he had no idea where accused no. 1 had directed him to and was quite flabbergasted when he saw her and *Andiswa* returning from the house with *V* in tow. He stated that he was even more dumbfounded when, upon ordering them to alight from his vehicle because of the commotion they were making, *V* remained seated. What then transpired he recounted in chief as follows: -

> “Yes. --- I can’t recall the specifics of the conversation but the general conversation then from Miriam’s side was that the child is poor hasn’t got clothes, look how she is dirty not dressed properly, she hasn’t even got shoes, you know please

feed her and buy food if you can. I then said I can't go do that now I have got people at home, if she goes with me to my house I can only bring her back at 12 o'clock I have got people working there until that time. I then basically said if that is fine with you people then you know I haven't got a problem with that, but I can't come back in between.

Alright. --- In Xhosa again, because I spoke in Xhosa I said [speaking Xhosa] is this okay with you people.

COURT Who said that accused no. 1? --- Yes I was having a conversation with M'Lady across the child out the door where she was sitting at the back, and by saying [speaking Xhosa] I basically referred to both of them at the same time.

MR PRICE Were there any objections from accused no. 1 or V? --- No there was no objections to accused no. 1 and I reiterated what I said to the child.

Just very briefly do you know where Andiswa was at this point in time? --- No she got out the side and she was somewhere.

You don't know where she was? --- No I [sound disappears]

Alright what happened next, did you talk to the child herself? --- Yes, like I said, I said is it okay with you, are you happy to come with me.

Alright, you were talking to both of them, is that what you are saying? --- Yes the door was open. I then said well close the door. And they closed the door and I drove off."

[24] The aforegoing account of the conversation between the accused was notably absent from accused no. 1's narrative in chief. During her cross-examination by Mr *Price* he cajoled her to agree with the proposition that prior to leaving *Analisa's* home she had told *V* that the purpose of fetching her was to provide her with ***"clothing and shoes"***. The anticipated response was however not forthcoming and further questioning to elicit a positive answer that she had,

proved futile. Under cross-examination by Mr *Coetzee* she denied accused no. 2's version of events and maintained that given the import of accused no. 2's telephonic discussion with her earlier that morning, she had assumed that they were en route to a shop where shoes would be bought for *V* and that he had made no reference to either shoes or clothing thereafter.

[25] Furthermore, *Andiswa's* evidence that there was no conversation at all between the occupants of the vehicle prior to her and accused no. 1 alighting therefrom was never challenged. Her version was that after *V* had been picked up, accused no. 2 drove to a squatter camp where she and accused no. 1 alighted and accused no. 2 drove off with *V*. Accused no. 1 moreover gave conflicting accounts concerning her disembarkation from accused no. 2's vehicle. Although she had stated in chief that accused no. 2 ordered her and *Andiswa* to alight from the vehicle because they were ***"making a noise"***, under cross-examination by Mr *Coetzee*, she steadfastly maintained that after fetching *V* there was complete silence until they disembarked. When Mr *Coetzee* reminded her about her earlier testimony that she and *Andiswa* had been making a noise she suddenly realised her folly and changed her testimony. When *Andiswa's* unchallenged testimony was put to her for comment, she could proffer no explanation. *V* herself gave a different account for accused no. 1 and *Andiswa's* disembarkation from the vehicle *viz*, to buy beer. Given the conflicting versions of the accused, the unchallenged evidence of *Andiswa* and *V's* testimony, the trial

court's finding that they had alighted from the vehicle pursuant to a previously devised strategy, is unassailable.

[26] The charge that the ***"time problem"*** cast further aspersions on the legitimacy of the prosecution is predicated on *Andiswa's* evidence that she went to Santa at 11 a.m. It is clear that her recollection of the time is clearly wrong. The fact that she was in the company of the accused was never placed in issue and the criticism that the State's case was rendered ***"vague and unconvincing"*** by reason of the ***"time problem"***, without any merit whatsoever.

[27] As adumbrated hereinbefore accused no. 2 denied having seen *V* prior to her entering the vehicle with accused no. 1 and *Andiswa*. He disputed accused no. 1's entire body of evidence concerning his knowledge of her, her name and that he had specifically requested accused no. 1 to find her that morning. It was suggested during argument that whilst accused no. 2 may perhaps unwisely, dishonestly and deliberately have falsely denied accused no. 1's evidence concerning both his knowledge of *V* and the reason for wanting to see her that morning, such denial should not impact deleteriously on his remaining testimony. Whilst there are indeed instances where an innocent person may furnish an untruthful answer(s) for fear that the truth may appear implausible, it can hardly be contended that an admission by the second accused, that he had prior knowledge of *V* and intended to purchase shoes for her on the morning in question, could have provoked disbelief, given his testimony that his generosity

to the less fortunate was a matter of public knowledge. His untruthfulness on this crucial aspect demonstrates, quite unequivocally, the correctness of the trial court's categorisation of his testimony as patently false.

[28] Accused no. 1's evidence was shown to be demonstrably false. In an exhaustive evaluation and appraisal of her testimony the trial court referred to its plethora of untruths, conflicts and inconsistencies. In her case too, the transcript validates the trial court's conclusion that her version was not reasonably possibly true.

[29] The trial court's judgment is well reasoned and the criticism, unwarranted. The evidence adduced was critically considered. The cautionary rule was properly applied and corroboration for *V's* testimony found in the medical evidence, *Andiswa's* testimony and the false evidence tendered by the accused. I am accordingly satisfied that there is no proper basis warranting interference with the trial court's factual findings, in particular, that accused no. 1 had procured *V* for accused no. 2's sexual gratification and that he in fact raped her on the morning of 15 June. Accused no. 2's appeal against the conviction on count 3 cannot be sustained. Mr *Coetzee* fairly conceded that the evidence adduced was wholly insufficient to found a conviction on count 5. I agree. The conviction on count 5 must accordingly be set aside.

[30] Accused no. 1 was convicted on counts 4, 6 and 7. Mrs *Crouse* submitted that the convictions on the latter two counts amounted to a duplication of convictions. The submission is untenable. The offences postulated by ss 17(2) and 71(1) of the Act are disparate offences, with their own elements. There is however a paucity of evidence to establish whether accused no. 1 procured *V* in return for the promise of financial reward, favour or compensation. Consequently, the conviction on count 6 must be set aside. The charge that the elements of count 7 had not been established is however, without merit. Trafficking is defined in s 70(2)(b) as to include:-

> "*(b)* **'trafficking'** includes the supply, recruitment, procurement, capture, removal, transportation, transfer, harbouring, sale, disposal or receiving of a person, within or across the borders of the Republic, by means of-
>
> (i) a threat of harm;
>
> (ii) the threat or use of force, intimidation or other forms of coercion;
>
> (iii) abduction;
>
> (iv) fraud;
>
> (v) deception or false pretences;
>
> (vi) the abuse of power or of a position of vulnerability, to the extent that the complainant is inhibited from indicating his or her unwillingness or resistance to being trafficked, or unwillingness to participate in such an act; or
>
> (vii) the giving or receiving of payments, compensation, rewards, benefits or any other advantage,"

The evidence adduced proved the commission of the offence.

Sentence

[31] Although accused no. 2 was granted leave to appeal against the sentence imposed in respect of count 3, on appeal before us, Mr *Raubenheimer* made no submissions thereanent. There is no proper basis warranting interference with the sentence imposed on count 3.

[32] In the result therefore, the following orders will issue:

1. The first appellant's appeal against her conviction on counts 4 and 7 is dismissed. The appeal against the conviction on count 6 is upheld and the conviction and sentence are set aside.
2. The second appellant's appeal against his conviction and sentence on count 3 is dismissed. The appeal against the conviction on count 5 is upheld and the conviction and sentence are set aside.

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D. CHETTY
JUDGE OF THE HIGH COURT

Nepgen, J

I agree.

_____
J. J Nepgen
JUDGE OF THE HIGH COURT

Griffiths, J

I agree.

_____
R.E GRIFFITHS
JUDGE OF THE HIGH COURT

Appearance:

For the 1st Appellant:	*Adv E. Crouse*
Instructed by:	*Grahamstown Justice centre* *69 High Street* *Grahamstown* *Ref: E Crouse*
For the 2nd Appellant:	*Adv H.M Raubenheimer SC*
Instructed by:	*Nelletons Attorneys* *118A High Street* *Grahamstown* *Ref: P Cloete* *Tel (046) 622 7149*
For the Respondent:	*Adv J C Coetzee* *Director of Public Prosecutions* *High Street* *Grahamstown* *Tel: (046) 602 3000*